



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
SUCCESSION CAUSE NO. 119 OF 1978

IN THE MATTER OF THE ESTATE OF THE LATE LALJI LADHARAM THANKI

RULING

1. The late Lalji Hadharan Thanky died intestate on the 28th June 1977 in Nairobi. He was survived by wife 4 sons and 7 daughters. Jitendrakumar Laljibhai Thanki, his son the administrator of the estate filed an application to confirm the grant on the 17/6/08. The grant was confirmed on the 28/7/08 as follows;

Names	Description of property	Share of Heirs
Hiraben Laljibhai Thanky		
Jagdish Laljibhai Thanky		
Jitenderakumar Lalj Ladharam Thanki		
Mukesh Laljibhai Thanky		
Ajay Laljibhai Thanky		
Pushpa J. Modha	One-third (1/3) share in L.R. No. 1870/IV/89	
Nirmala V. Modha	One-third Share in L.R No. 3734/352	In Equal share.
Mradula M. Modha	One-third (1/3) share in L.R No. 209/1220/3	
Manjula A. Joshi		
Kusum K. Joshi		
Kiran A. Joshi		
Kalpana Thanky		
Sheela Bhogaita		

After the confirmation of the grant. The widow of the deceased and his 2 sons have filed applications dated the 29/7/2015 and 26/8/2016. The application dated 29/7/2015 is filed by Mukesh Laljibhai Thanky a son of the deceased and beneficiary. The application dated 26th August 2016 is filed by Mrs Hiraben Laljibhai and Mr Ajay Laljibhai Thanky widow and son of the deceased (beneficiaries). The deceased

died and was survived by the following beneficiaries;

Hiraben Laljibhai Thanky-wife, Jagdish Laljibhai Thanky-son, Devkrishan Lalji Ladhram Thanki (deceased)-son, Jitendrakumar Lalji Ladharam Thanki –son, Mukesh Laljibhai Thanky –son, Ajay Laljibhai Thanky-son, Pushpa J. Modha- daughter, Kanta L. Modha- daughter, Nirmala V. Modha-daughter, Mradula M. Modha- daughter, Manjula A Joshi -daughter, Kusum K. Joshi - daughter, Kiran A Joshi- daughter.

2. The application dated the 29th of July 2015 is brought under section 83 (e) of the Law of Succession Act Cap. 160 and Rule 59 of the Probate and Administration Rules. The applicant seeks the following orders:

1. Spent

2. Pending the hearing and the determination of the application Jitendra Lalji Ladharam Thanki be restrained from threatening to evict or evicting the applicant from the family residence, erected on L.R. No. 209/1220/3.

3. That the administrator of the estate Jitendrakumar Lalji Ladharam Thanki be compelled to give a full account of the rent received on behalf of the estate properties to wit. L.R. no. 1870/IV/89 and L.R. 3734/352 from the time of the deceased's death and to avail the applicant's share of the one-third (1/3) that is to be available for distribution to the beneficiaries.

4. That the administrators be compelled to furnish all the relevant documents relating to the disposal of the other estate properties and to avail the applicant's share of the one-third (1/3) share of the actual sale price of L.R. No. 1870/IV/ 89 and L.R. No. 3734/352 available for distribution to the beneficiaries.

5. That the administrator of the estate Jitendrakumar Lalji Ladharam Thanki be ordered to pay to the applicant herein Mukesh Laljibhai Thanki his lawful share.

6. That costs of the application be provided for.

3. Mukesh Thanki in his affidavit dated the 29/7/2015 avers that he is a beneficiary of the deceased's estate. During the life time of his parents they resided in the house erected on **L.R. No. 209/1220/3** which is a part of the deceased's estate. The deceased owned a 1/3 share in L.R 3734/352 and 1/3 share in L.R o. 1870/10/89. The 2/3 share in each of the properties were owned by his 2 brothers Jitendrakumar Lalji Ladharam Thanki and Devkrishan Laljibhabi Ladhahbai Thanki each holding 1/3 share respectively **L.R. No. 3734/352** situated on Othaya Road in Lavington has erected on it a bungalow and rent has always been derived from it. **L.R. No. 1879/10/89** has residential property on which there is erected a double stay residential two identical blocks of 4 bedroomed self -contained flats with servants quarters from which rent is always been derived. After the demise of his father the said rents were collected by the administrator and to date there has been no account of the rental income derived from the said property. Mukesh has confirmed he resides in the said property. His mother and the administrator no longer live there. Their mother migrated and the administrator moved out. That during the confirmation of the grant the administrator of the estate caused the granted to be confirmed on the basis of 1/3 share **L.R No. 3734/352** and 1/3 share in **L.R No. 1870/10/89** both were given the value of Kshs. 13,666,666/- and Kshs. 13,333,333.33 respectively.

4. According to Mukesh it has transpired the L.R No. 3734/352 was disposed off by sale to Rosewood Villas Limited for a consideration Kshs, 128,000,000/- and **L.R. No. 1870/10/89** was disposed by way of sale and transfer to Sepal Gloma Limited for a consideration of Kshs. 130,000,000/-. Accordingly 1/3 share in **L.R. No. 3734/352** was sold off for a consideration of Kshs. 42,666,666.70 while 1/3 share in L.R No. 1870/10/89 was sold off at Kshs. 43,333,333.30 and not the figures alluded to in the application for grant. That the administrator wants him to vacate the property in order for him to complete the

administration of the estate by paying him the amounts stipulated in the application yet he has been paid much more sums for the estates share in the said properties. That he requires a full and just and lawful entitlement before he vacates. That in the interest of equity the administrator should account for and avail the rent for distribution but the beneficiaries.

5. Jitendrakumar Laljibhai Thanki filed a replying affidavit dated 30/10/15 in response to the affidavit of Mukesh. He admits that he is the administrator of the deceased's estate. On L.R. 209/1220/3 he explains that him together with his late brother Devkrishan Laljibhai Ladhahbai Thanki and his late father acquired the said property as tenants in common each holding 1/3 share on the 30/6/76, none of his parents or sibling resided on the property as a family home. The grant of letters administration of his father estate was issued to him after his father's death on the 11/5/78 and the grant was registered against the title of the property on the 7/5/1982. His late brother and him leased the property to Mr. Aziz Islamshah for 2 years from 1/1/1981. The lease was registered against the title on the 7/5/1982. The lease was renewed for the entire part of 1980's. That in 1987 his late brother and him allowed Mukesh Thanky to occupy the property. His brother died on the 22/3/04 and bequeathed his 1/3 share to his 2 daughters Kalpana Devkrishan Laljibhai Thanki and Sheela Bhogaita. The grant of probate of his late brother's estate was registered against the title of the property on the 18/2/2013. That thereafter he acquired his late fathers and late brothers 2/3 share in the property pursuant to a sale and transfer for valuable consideration from his late father's estate and his late brother's estate. The transfer and transfer by asset in his name were registered against the title of the property on the 20/4/2014 and this he is the sole absolute registered owner of the property. That his father's 1/3 share in the rent collected from **L.R. No. 3734/352** and 1870/10/89 was paid to their step mother Hiraben Laljibhai Thanky and an account was forwarded to Mukesh when the application to confirming the grant was made in court for the estate of the father. Mukesh's objection to the accounts given in respect of his father's 1/3 estate was dismissed by the court.

6. That Mukesh's demand for account 7 years after the confirmation of grant of letters of administration is not made in good faith and is only relied upon to resist his entitlement to vacant possession of property L.R. 209/220/3. That accounts were settled at the time of the confirmation of the grant of letters of administration for the estate of the late father on the 29/7/2008. That he acquired 1/3 of his late father's share and 1/3 of the brothers share in **L.R. 3734/352 & 1870/10/89** pursuant to a sale and transfer for valuable consideration and he sold and transferred the said properties to the current owners. That each of 13 beneficiaries of the estate of his father was entitled to 1/3 of is late fathers share in the 3 properties being Kshs 3,102, 564.00. All beneficiaries with the exception of Mukesh Thanky have been paid and accepted their share of entitlement from the estate of his father. That Mukesh has no right to resist handling over the vacant possession of the property L.R. 209/1220/3 as he is the registered owner and is entitled to possession. That at the time of negotiating the purchase of his late father and late brother's share in the 3 properties his step mother's auditor Kothari and Company gave an account of rent remained on behalf of the late father's 1/3 share in the 3 properties.

7. Mukesh filed a supplementary affidavit dated the 19/2/16 reiterating what he deponed in his affidavit in support of his application and denying what is deponed by the administration on the 2 properties. He avers that the sale transfer, and transfer by asset of the 1/3 share in L.R 3734/352 & 1870/IV/89 was obtained through false representation by the administrator in order to obtain the consent of the beneficiaries. That there is no certified valuation report order proof to show that 13 beneficiaries are entitled to Kshs. 3,102,254/-. Since they were not aware of the contentious circumstances touching on the distribution of the estate.

8. In the Notice of Motion dated 26/08/16 the applicants Mrs. Hiraben Laljibhai Thanky and Mr. Ajay Laljibhai Thanky, seek the following orders;

i. Spent

ii. That Jitendra Lalji Ladharam Thanki and or his agents be restrained from disposing of by sale or otherwise interfering whatsoever or dealing with the interest of the deceased and or beneficiaries of the deceased's estate in L.R. No. 209/1220/3 pending the hearing and determination of this application.

iii. That Jitendrakumar Lalji Ladharam Thanki being the administrator of the estate of the deceased herein be compelled to render to the court and the beneficiaries/applicants a full and accurate account of all rental and any other income received on behalf of the estate properties namely L.R. 1870/IV/89 and L.R. 3734/352 from the time of the deceased's death to-date and to make the same available for proper and equitable distribution among the beneficiaries.

iv. That the said administrator be compelled to furnish all the relevant documents (*including agreements for sale, transfer and payment remittance receipts /advises*) relating to the sale and transfer of properties namely L.R. 1870/IV/89 and L.R. No. 3734/352 and to make the same less the monies that may have been paid to any beneficiary) available for proper equitable distribution among the beneficiaries.

v. That the transfer of the one third (1/3) share of L.R. No. 209/1220/3 by the said administrator to himself be annulled/cancelled and the said share of the property be distributed equitably among the beneficiaries

vi. That the costs of the application be provided for.

9. The application is supported by the sworn affidavit of the two applicants who are widow and son of the deceased respectively. They aver that the deceased died on 28th June 1977 and the grant of letters of administration intestate was issued to Jitendra Lalji Ladharam Thanki on 11th May 1978 and was later on confirmed by this court on 29th July 2008. That during the lifetime of the deceased the family resided on L.R. No.209/1220/3 which remained the case until April 1986 when they moved to the United Kingdom where they reside but Mukesh Laljihani Thanky stays on and takes care of the Laljibhai property on behalf of the family and which home they aver should be available when they are home for holiday. That other than the said property the deceased also owned the following properties;

i. 1/3 share in L.R. 1870/IV/89 situated in Rhapla Road Terrace close residential property with double story residential blocks of four bedroom flats with servant quarters.

ii. L.R. No. 3734/352 situated on Othaya Road Lavington Nairobi with a residential rental house.

10. That the administrator has always treated the properties as his even though he is only entitled to 1/3 of the three properties and has since the demise of the deceased continued to collect the rental income which he has never accounted for. That 2 years earlier the administrator had informed them that he had sold the two and properties L.R. 1870/IV/89 and L.R. No. 3734/352 and paid them Kshs. 3,102,564 which he claimed is what was entitled to them only to later on learn that the said properties were sold for Kshs. 130,000,000/- and Kshs.128,000,000/- which is way above the amounts the administrator had told them. They aver that the administrator is out to defraud and deceive them of their due share adding that the administrator has secretly and fraudulently transferred L.R. 209/1220/3 deceived the beneficiaries of the share (which is their residential home) without informing them which is in breach of trust bestowed on him adding that the same should be annulled and cancelled so that the same remains available for all beneficiaries to share. That it is in the interest of justice that this application is granted to facilitate the proper, equitable and final administration of the estate of the deceased.

11. The respondent in opposition to the said application filed a replying affidavit dated 5th October 2016. He reiterates what he deposed in his affidavit opposing the application dated 29th July 2015. He avers further as follows that; that he and his brother as joint owners of L.R. 209/1220/3/IV/89 and 3734/352 received entitlement to the rent collected on properties L.R. 1870/IV/89 and 3734/352. That his father's 1/3 share of rent due on properties L.R Nos. 1870/IV and 3734/352 was collected by Mrs. Hiraben Thanky and that Mr. Ajay Thanky has no claim of entitlement of his late father's 1/3 share of rent due to properties no. L.R. 1870/IV/89 and 3734/352 as the same had been collected by his mother Mrs. Hiraben Thanky. That the estate accounts for the period 1978 to 1983 were duly filed in court on 2nd July 2007. While accounts for 1984 to 2006 were filed in court on 7th July 2009 accompanied by the application for confirmation of grant. That Mrs. Hiraben Thanky and Mr. Ajay consented to the said accounts. The only

beneficiary who objected to the confirmation of grant was Mr. Mukesh Thanky and his objection was heard and dismissed and the grant was confirmed on 29th July 2009 based on the valuation carried out on the three properties done in March 2008. That since it was not easy to sell off the properties he negotiated to purchase his late brother's 1/3 share in the three properties and the same was sold and transferred to him by the beneficiaries. His late brother's estate receiving 1/13 of his late father's 1/3 share which translated to Kshs. 3,102,564.00 and an equivalent of 1/3 of his late brother's share in the three properties being Kshs. 40,333,332.00. That each beneficiaries of his father got 1/3 share of the three properties which translated to Kshs. 34,333,333.20 with each beneficiary getting 1/12 of the same which came to Kshs. 3,102,564.00. That he relied on the value of kshs.40, 333,332.00 for which he purchased his late brother's 1/3 share in the properties. He paid off the 11 beneficiaries save for Mukesh Thanky who refused to accept the payment. That later on he sold and transferred L.R. No. 1870/IV/89 and 3734/352 for Kshs. 130,000,000.00 and Kshs. 128,000,000.00 respectively after acquiring his father's and brother's 2/3 share and the transfer was effected when he was the absolute registered owner. That Mrs. Hiraben and Mr. Ajay have no entitlement to the price for which the two properties were sold to third parties adding that the claim of fraud alleged by the applicants is baseless. That the consent of Mrs. Hiraben Thanky and Mr. Ajay Thanky empowered him to sign the transfer by Assent to himself, in respect of his later father's 1/3 share in property Land reference number 209/1220/3. He has dutifully administered the estate of his late father since 1978 despite enormous opposition from some of the beneficiaries, in particular, Mr. Mukesh Thanky. That the current summons by Mrs. Hiraben Thanky and Mr. Ajay Thanky is moved and fueled by the greed of Mr. Mukesh Thanky, who wants to use all excuses and some beneficiaries to resist the request to vacate property L.R. No. 209/1220/3 which he has no entitlement to or valid claim on.

12. The applicants filed a further affidavit dated 18th October 2016 laying emphasis on their claim as against the respondent particularly on sale and transfer of the 1/3 share of the deceased's share without consulting the beneficiaries. The applicants argue that the respondent has failed to negotiate for the sale of their 1/3 share entitled to the deceased of the deceased. Whilst questioning the estimated sale value used by the respondent only for him to sell the said property for much higher a year later. They aver that from calculations the beneficiaries should have gotten at least Kshs. 9,180,000/- and not Kshs. 3, 102, 564. The applicants also claim that the respondents did not give them a share of the rental income as alleged in this regards the respondent should adduced before this court how the said monies were share and evidence on how the same was transferred to the applicants.

13. At the hearing the two applications, parties submitted as follows; Miss Kamau for the 1st applicant Mukesh Thanky argued that what they seek are accounts of the estate. She reiterated what is deponed in the applicant's affidavit adding that they demand all documents that relate to L.R. 209/1220/3. That Section 83 (g) of the Law of Succession imposes a duty on the administrator to produce accounts six (6) months after the administration of the estate. That from the email of 8/12//15 it is clear that the administration was completed the last months of 2014. That there was breach of trust in that after the confirmation of the grant the administrator transferred the property to himself. That the other beneficiaries are not in Kenya.

14. Mr Havi for the Respondent whilst opposing the application submitted as follows; that under Section 83 (e) the accounts are to be filed six months after. He too reiterated what is deponed by the respondent in his affidavits. It was submitted further that the respondent did comply with the provisions of Section 83 (g). That the respondent has demonstrated how the property belongs to him and that 1st applicant cannot dispute vacant possession. That Mukesh is entitled to one of 13 out of his father's estate yet he demands the net of the 2 properties that it is a misrepresentation on his part. That since Mukesh has refused to vacate the premises he is in illegal possession of the property he is occupying. That at the time the respondent acquired an interest the property and nothing stopped him from selling the property at a higher price. The respondent relied on the case of In the **Estate of James Karanja Kioi (deceased) (No. 2 (2005) eKLR** and submitted that the ratio by Justice Koome was that in cases of administration of an estate all issues must be brought on board and it is an abuse to reopen a case and litigate another case. That Mukesh has not stated why the 3.1 million is not satisfactory and what other higher sum he wants and that the application is an abuse of the court of process. Miss Kamau in response submitted that the court should exercise its discretion and that there was no evidence of the transfer of the estate to the administrator. That he did wrong in transferring the property to himself. That the applicant occupied the

property from the time the grant was issued and that it was family property.

15. Mr. Isundu for the 2nd and 3rd applicants reiterated what is deponed in the affidavits of Mrs. Hiraben Thanky and Mr. Ajay Thanky. He added that the sale of the properties was done through the firm of Mr. Havi and that the letter that was written was meant to wood wink the beneficiaries. That the executor intended to fraudulently act against the interest of the estate against his own brothers and sisters. On the transfer of the property it was submitted that Section 82 of the Law of Succession is clear on the power the personal representative has to transfer property. That he must do so in accordance with the law reference was made to Section 92. It was further submitted that the administrator is a trustee and must act in the best interest of the estate. That selling secretly is an act of bad faith fraudulent and under Section 82 (i) it is voidable at the instance of any party. That to that extent they desire that the transfer of the last property be declared null and void and that the family can then use it. That the applicants are apprehensive that the amounts in the transfer are not the correct amounts and that parties do declare the lesser amount for purposes of stamp duty thus they are seeking for the documents to show that the beneficiaries have the proper value. That the accounts are necessary for a proper distribution to be done and the beneficiaries are free to renounce their inheritance to those who want a fair inheritance should they get their portion.

16. Miss Kamau in response to the 2nd application reiterated her earlier submissions and adding that the respondent cannot rely on section 50 (2) of the Land Act to justify his act of transfer of the property. That the said section is meant to assist him fulfilling the conditions set out in the confirmed grant and should be read together with Section 82 and 70 of the Law of Succession Act Cap 160. Mr. Havi in response argued that the 2nd application was a continuation of the application dated 27th of July by Mr. Mukesh. He reiterated his submissions for the 1st application adding that the applicant's claim that the property in issue is family property is false. he referred to the various documents demonstrating how the respondent owns the property. He questioned what other distribution would be there as the 13 beneficiaries had received their portions of the inheritance. He added further that Section 79 of the Law of Succession Act which vests property of a deceased in a personal representative of the estate. It submitted further that everything done is done by a beneficiary consent and that the administrator has no obligation now to explain how the 2/3 was spent. That the request made under Section 23 is incompetent and that Section 83 (e) obligates the administrator within 6 months from the date of the grant and not confirmation of the grant to produce to the court a full and accurate inventory of the assets and liabilities of the deceased. That they have filed accounts from 1978 and progressively to 2007. That the courts has held in several decisions that upon confirming the grant the court becomes functus officio unless it is being called upon to revoke the grant, for this submission they relied on the case of **Fred Ouma Owino & Anor – Vs. Hulda Akeyo Otieno & 2 others (2015)**. That the application by Mukesh is veiled attempt to relinquish the property to the administrator, an abuse of the court process. That the said affidavit of Mukesh has thrown mud on the administrator and himself as an advocate. In response Mr. Isundu stated that the respondent's submissions on functus officio are wrong in light of the provisions of Section 83 (g) (h) and (i) of Cap 160. That the properties were sold for more money and that the vesting powers are given to the administrator under section 79 are not absolute.

17. Parties also filed written submission in respect of the two applications. The said submissions were highlighted in court as summarized in this ruling. In their submissions, the 1st applicant relied on the case of **Commissioner of Stamp Duty Vs. Livingston (1965) AC 694** where it was held “**Whatever property came to the executor *virtute officii* came to him with full ownership, without distinction between legal and equitable interest. The whole property was his. He held it for the purpose of carrying out the functions and duties of administration, not for his own benefit**”, to stress the point that the administrator is a trustee and should act as such to the beneficiaries of the estate. The 1st applicant also relied on the case of **Stephens and others Vs. Stephens and another (1987) KLR 125** where **Apaloo JA** stated that upon being appointed as administrator one incurs the responsibility of honest, efficient and high minded dealing in the property. it was submitted that on the facts of the said the Court of Appeal found that the beneficiaries were entitled to a declaration that they held beneficial interest in the property and that the administrator's action of transferring the property to another person was in breach of his fiduciary duty to them and was flagrant breach of trust. The administrator was expected to

render account of his administration to the other beneficiaries.

18. The respondent in his submissions in addition dealt with the following issues; on Vacant possession of property land reference number 209/1220/3 that was submitted. That the registration of the property in the name of Mr. Jitu Thanki vested in him all rights of ownership including possession as provided under Section 24 of the Land Registration Act, No. 3 of 2012. That any challenge to Mr. Thanki can be addressed only through the Environment and Land Court, No. 19 of 2011. On the issue of injunction it was submitted that Mukesh cannot deny Jitu possession of the property on account of his claim for money. For this argument the respondent cited the case of **Nguruman Limited Vs. Jan Bonde Nielsen & 2 others (2014) eKLR**, where the Court of Appeal set aside an injunction issued against a registered owner of property and also the case of **Sehit Investments Limited- vs. Josephine Akoth Onyango & 3 others (2015) eKLR** at page 23 where the Court held that “ **The subject property was duly registered in the name of the 1st defendant and until the same was reversed, the court could not grant orders to restrain a party who was the duly registered owner of a parcel of land from accessing or dealing with property that belonged to it**”. It was further submitted that Mukesh has not sought to reverse the transfer of the property to Jitu Thanky and therefore the injunction cannot be granted. On the issue of account for rental income for the two properties L.R No. 1879/IV/89 and 3734/352 it was submitted that the 2nd applicant has not challenged the figures she was given on the accounts filed in court before confirmation of the grant and that Mukesh’s objection was dismissed and therefore the request being made now is not only an abuse of the court process but res judicata. For the argument the respondent relied in the case of **Venessa Gathoni Kamau Vs. Bank of India, H.C.C.C No. 491 of 2008**, where the High Court refused a request for injunction on facts previously dismissed. That the request of Mukesh on the rental income was previously raised on the 9th of July 2007 and his objection was dismissed by the court.

DETERMINATION

19. Having considered the affidavits filed by the parties and submissions and authorities cited I find as follows; there is a sale agreement dated 13th March 2013 between Kaplana Dekrishan Lsaljibhai Thanki and Sheela Bhongaita vendor and Jihindrakumar Lalji Ladharam Thanky purchaser for the 1/3 share belonging to the late Devkrishna Laljibhai Thanki and 1/13 share of the property being share of late Devkrishna Laljibhai Thanki from his father Lalji Ladharam Thanki for L.R. No. 209/1220/3 Batu Batu Road, Parklands, Nairobi. The same was to be for a consideration of Kshs. 12,923,077.00. There is also a transfer dated 2nd December 2013 between Kaplana Dekrishan Laljibhai Thanki and Sheela Bhongaita vendors and Jihindrakumar Lalji Ladharam Thanky. A look at the attached copy of title for shows that the 1/3 share of the said Devkrishna Laljibhai Thanki was registered on 27/12/2013 and transfer by Assent to the respondent was done on 30/7/2014 to Jihindrakumar Lalji Ladharam Thanky for Kshs. 17,948,718.00 who subsequently sold and transferred the same to Rose wood Villas Limited for Kshs. 128,000,000 and the same was registered on 11/9/2014 two months later.

20. There is a sale agreement between Kaplana Dekrishan Laljibhai Thanki and Sheela Bhongaita vendors and Jihindrakumar Lalji Ladharam Thanky dated 13th March 2013 for 1/3 share of Devkrishna Laljibhai Thanki in L.R. No. 3734/352 Othaya Road Lavington, Nairobi and 1/13 share of Devkrishna Laljibhai Thanki from the estate of Lalji Ladharam Thanki. The sale price is Kshs. 17,948,718.00 and a transfer dated 2nd December 2013 for the said property. This was followed by a transfer by Assent to Jihindrakumar Lalji Ladharam Thanki. There is a sale agreement between Kaplana Dekrishan Laljibhai Thanki and Sheela Bhongaita vendors and Jihindrakumar Lalji Ladharam Thanky dated 12th March 2013 for 1/3 share of Devkrishna Laljibhai Thanki in L.R. No. 1870/IV/89, Nairobi and 1/13 share of Devkrishna Laljibhai Thanki from the estate of Lalji Ladharam Thanki. The sale price is Kshs. 12,564,103.00 and a transfer dated 2nd December 2013 for the said property. This was followed by a transfer by Assent to Jihindrakumar Lalji Ladharam Thanki. There is a sale agreement between Kaplana Dekrishan Laljibhai Thanki and Sheela Bhongaita vendors and Jihindrakumar Lalji Ladharam Thanky dated 18th March 2013 for 1/2 share of Devkrishna Laljibhai Thanki in L.R. No. 1870/1/413, Mpaka Road, Nairobi share of Devkrishna Laljibhai Thanki. The sale price is Kshs. 10,000,000.00 This was followed by a transfer by Assent to Jihindrakumar Lalji Ladharam Thanki. From the foregoing, it is clear that the beneficiaries of the estate of the late Devkrishna Laljibhai Thanki had sold and transferred their

share to the said suit properties to properties Jitendrakumar Lalji Ladharam Thanki.

21. The respondent alleges that the consent by the applicants for confirmation of grant of the estate of Lalji Ladharam Thanki signed by Ajay Laljibhai Thanky and Hiraben Laljibhai Thanky both dated 25th October 2007 consented to the distribution of the assets. However, it is important to point out that the issue of transfer of their share to the respondent is not an issue that can be ignored. The respondent has not adduced any evidence to show how he acquired the 1/3 share belonging to the applicants. No sale agreement or transfer documents in regards to the same has been adduced. No evidence has been adduced to indicate that the two had consented to a transfer of their share to the respondent. How then did the respondent deal with the 1/3 share belonging to the applicants without their consent? This is an issue that needs to be interrogated further.

22. The allegations of fraud in the said transactions and the allegations as raised by the applicants in my view hold no water. Section 107 of the Evidence Act (Chapter 80 of the Laws of Kenya) provides: “(1) *Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*” The evidential burden is upon any party the burden of proving any particular fact which he desires the court to believe in its existence. Section 109 of the evidence Act provides that, “*The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*” While Section 112 of the Evidence Act provides that, “*In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.*” The standard of proving a case of fraud is higher than that of civil case of on balance of probability as was held in the case of, “**Urmila w/o Mahendra Shah -vs- Barclays Bank International Limited & Another, (1979) KLR 76** where the court stated that the standard of proving allegations of fraud was more than balance of probabilities. I find that the applicants have merely made allegations but have not adduced evidence to support the claim of fraud as such I find the same has not been proved and cannot stand.

23. The applicants seek the respondent be compelled to render full and accurate account of all rental and any other income received on behalf of the estate properties namely L.R. 1870/IV/89 and L.R. 3734/352 from the time of the deceased’s death to-date and to make the same available for proper and equitable distribution among the beneficiaries. From a perusal of the bundle of documents by the respondent it appears that the administrator / respondent had filed estate accounts between 1978 to 1983. There is however, a letter dated 19th September 2007 addressed to Mrs. Hiraben Thanki on income and tax running from 1984 to 2006 from Kothari & Company certified Public accountants. The applicants appear not to have queried the same. However there is no record of the accounts from 2006 to 2014 when the said properties as said to have been sold. Section 83(h) provides that, “*to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.*” From the foregoing it is clear that the respondent has not given account from the year 2006 to 2014 and as such I order the respondent to comply with the provisions of this Section within 60 days.

24. It goes without saying that JitendraKumar Lalji Ladharam Thanki should render to this court and the beneficiaries/applicants a full and accurate account of all rental and any other income received on behalf of the estate properties namely L.R. 1870/IV/89 and L.R. 3734/352 from the time of the deceased’s death to-date and to make the same available for proper and equitable distribution among the beneficiaries. The administrator shall furnish this court with the sale agreements for the said properties **L.R. 1870/IV/89** and **L.R. No. 3734/352** less the monies that may have been paid to any beneficiary and avail the same for proper equitable distribution among the beneficiaries.

25. The respondent has furnished copies of sale agreements and transfers by the beneficiaries of the estate of the late Devkrishna Laljibhai Thanki for his 1/3 share of the said property. However, there is no sale agreement evidencing any sale by the applicants or any transfer of the share belonging to his late brother. As such the respondent to the on the sale or transfer of the share belonging to the applicants for the sale of the two properties L.R. 3734/352 Othaya Road – Lavington Nairobi, L.R. No. 1870/IV/89 Terrace Close

Westlands, Nairobi and L.R. 209/1220/3 Batu Batu Road, Parklands Nairobi. There is no valuation report carried out to ascertain the market value of the properties sold by the respondent.

26. It is my view pending the administrator providing the accounts as sought he is restrained from evicting Mukesh Laljibhai from the family residence , erected on L.R. No. 209/1220/3.

27. These are the orders the court grants for the applications dated 29th July 2015 and application dated 26th August 2016;

i. The respondent is restrained from evicting the applicant from L.R. No. 209/1220/3.

ii. The administrator of the estate Jitendrakumar Lalji Ladharam Thanki is hereby ordered to give a full account of the rent received on behalf of the estate properties to wit. L.R. no. 1870/IV/89 and L.R. 3734/352 from the time of the deceased's death the same to be done within 60 days from the date of this ruling. The same to be served on the counsels for the applicant within the said 60 days.

iii. The administrators is hereby ordered to furnish all the relevant documents relating to the disposal of the other estate properties and the actual sale price of L.R. No. 1870/IV/ 89 and L.R. No. 3734/352 within 60 days from the date of this ruling.

iv. The court has partially granted orders sought by the applicants. The issue of equal distribution of any amounts to the beneficiaries and annulment of their share of their property shall be dealt with once the respondent has complied with the orders of this court. Matter to be mentioned after the 60 days on the 25/9/2017 at 2.30 pm. This being a family matter cost shall be in the cause. It is so ordered.

Dated, signed and delivered this 12th day of July ,2017.

R. E. OUGO

JUDGE

In the presence of;

Miss Maina holding brief for Mr. Wandabwa For Mukesh Thanky/Applicant

Mr. Isindu for Mrs Hiraben Thanky and Mr. Ajay Thanky/Applicant

Miss Aaisha holding brief for Mr. Havi For Jitendrakumar Thanki/Respondent

MS. Charity Court Clerk

MS. Charity Court Clerk